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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Town of Colorado City, an Arizona  
municipality,

Plaintiff,

v.

United Effort Plan Trust, et al.,

Defendants.

No. CV11-08037-PHX-DGC

**ORDER**

Defendants United Effort Plan Trust (“UEP Trust”) and Bruce Wisan as Special Fiduciary of the UEP Trust (collectively, the “Trust Defendants”) move to dismiss the First Amended Complaint (Doc. 16) pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The motion is fully briefed.<sup>1</sup> Docs. 32, 37, 40. Defendants Ronald and Jinjer Cooke (“the Cookes”) have filed a separate motion dismiss and joinder in Trust Defendants’ motion to dismiss. Doc. 41. The Court accepts the Cookes’ joinder in Trust Defendants’ motion to dismiss. The Court will deny the motion to dismiss for the following reasons.

**I. Background.**

In 1942, members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (“FLDS”) established the UEP Trust under Utah law. Doc. 16, at 3. From its

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<sup>1</sup> Plaintiff’s request for oral argument is denied because the issues are fully briefed and argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b).

1 establishment in 1942 until 1998, the UEP Trust was considered a charitable, religious  
2 trust. *Id.* In 1998, the Utah Supreme Court issued a decision in *Jeffs v. Stubbs*, 970  
3 P.2d 1234 (Utah 1998), holding that the UEP Trust was not a charitable trust because it  
4 specifically named identifiable beneficiaries. *Id.* at 4. The *Jeffs* court reformed the UEP  
5 Trust. *Id.* The UEP Trustees then restated the Trust and redefined its beneficiary class.  
6 *Id.*

7 On May 26, 2005, the Utah Attorney General brought an action for breach of trust  
8 (the “trust litigation”) against the UEP Trustees in the Fifth Judicial District Court for the  
9 State of Utah. *Id.* The Utah Attorney General brought the action as a probate matter  
10 pursuant to Utah’s Uniform Trust Code and sought an order suspending the authority and  
11 power of the Trustees and appointing an interim special fiduciary to preserve the assets of  
12 the Trust. *Id.* at 4-5. Judge Denise Lindberg, who presided over the trust litigation,  
13 granted the motion for a temporary restraining order, removed the trustees, and appointed  
14 Bruce Wisan to act as UEP Trust’s special fiduciary. *Id.* at 5. On October 13, 2005,  
15 Judge Lindberg issued a memorandum decision holding that the Constitution forbade her  
16 from reforming the Trust on the basis of religious doctrine, and consequently sought to  
17 apply neutral principles of law to the reformation. *Id.* On October 25, 2006, Judge  
18 Lindberg created the reformed UEP Trust and expanded the special fiduciary’s powers,  
19 vesting Wisan with extensive authority to manage Trust property, including identifying  
20 and providing homes to UEP Trust beneficiaries. *Id.* at 6.

21 On October 6, 2008, the FLDS filed a lawsuit in Utah federal district court against  
22 Wisan, the Utah and Arizona attorneys general, and Judge Lindberg, claiming that the  
23 Utah state court’s reformation of the UEP Trust, specifically divorcing the Trust’s  
24 operation from its religious underpinnings, and subsequent administration of the trust  
25 through the special fiduciary, violated their First Amendment rights (the “FLDS  
26 Lawsuit”). Doc. 16, at 6. On February 24, 2011, Judge Dee Benson granted a  
27 preliminary injunction in favor of the FLDS, which has been stayed and is currently  
28 pending before the Tenth Circuit. Doc. 32, at 4.

1 In 2008, Wisan issued an occupancy agreement to Ronald and Jinjer Cooke on  
2 property located at 420 East Academy, Colorado City, Arizona (the “Property”). *Id.* The  
3 Property did not have a culinary water connection, and a dispute arose between the  
4 Cookes and various municipal bodies as to whether a new water connection should be  
5 established. Doc. 16, at 11-12. In June 2010, the State of Arizona filed a lawsuit against  
6 Colorado City in Maricopa County Superior Court. *Id.* at 13. The Cookes filed a  
7 corresponding lawsuit alleging discriminatory and unlawful housing practices in Arizona  
8 federal district court (the “Cooke Litigation”). *Id.* The State intervened in the Cooke  
9 Litigation, and that case is now proceeding as a single action in this Court before Judge  
10 Teilborg. No. CV10-08105-JAT.

11 Prior to 2007 and Wisan’s appointment as special fiduciary, Robert Black  
12 occupied the Property. Doc. 16, at 13. In 2001, Black obtained a building permit from  
13 Colorado City to construct a home on the property. *Id.* at 14. UEP Trust and Wisan have  
14 since declared that Black abandoned the Property, but did not take any action to  
15 extinguish Black’s right to occupy the Property as required under Arizona law. *Id.* UEP  
16 Trust and Wisan assigned the Property to the Cookes, as discussed above. *Id.* Black has  
17 asserted an ongoing right to occupy the Property, including applying for another building  
18 permit. *Id.* at 15.

19 On July 7, 2011, Plaintiff Colorado City filed its First Amended Complaint in this  
20 case. Doc. 16. In Count One, Colorado City asks this Court for a declaration regarding  
21 whether Wisan’s actions as special fiduciary following the UEP Trust reformation were  
22 unconstitutional. Doc. 16, at 15. In Count Two, Colorado City seeks a declaration from  
23 this Court regarding whether the Cookes or Black have the right to occupy the Property.  
24 *Id.* Judge Teilborg has denied Colorado City’s motion to transfer and consolidate this  
25 case with the Cooke Litigation. Doc. 42.

## 26 **II. Rules 12(b)(1) and (6).**

27 Dismissal is appropriate pursuant to Rule 12(b)(1) where the court lacks subject  
28 matter jurisdiction over a claim. Fed. R. Civ. P. 12(b)(1). The court presumes that a

1 claim lies outside the jurisdiction of federal courts unless proven otherwise. *See*  
2 *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The plaintiff bears the  
3 burden of establishing that jurisdiction exists. *Indus. Techtonics, Inc. v. Aero Alloy*, 912  
4 F.2d 1090, 1092 (9th Cir. 1990). A Rule 12(b)(1) jurisdictional attack may be facial or  
5 factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a  
6 facial attack, the challenger asserts that the allegations contained in the complaint are  
7 insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack,  
8 the challenger disputes the truth of the allegations that, by themselves, would otherwise  
9 invoke federal jurisdiction.” *Safe Air*, 373 F.3d at 1039. In resolving a facial attack, the  
10 court must accept the factual allegations of the complaint as true and draw all reasonable  
11 inferences in the plaintiff’s favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).  
12 In resolving a factual attack, the court “may review evidence beyond the complaint  
13 without converting the motion to dismiss to a motion for summary judgment.” *Safe Air*,  
14 373 F.3d at 1039. The court may not resolve genuine factual disputes if the jurisdictional  
15 issue and substantive issues are intertwined. *See id.*; *Roberts v. Corrothers*, 812 F.2d  
16 1173, 1177 (9th Cir. 1987). Where such issues are intertwined, the court must find that  
17 jurisdiction exists and address the motion to dismiss as a motion for summary judgment  
18 attacking the merits of plaintiff’s case. *Safe Air*, 373 F.3d at 1039-40, n.3.

19 Dismissal is appropriate pursuant to Rule 12(b)(6) where the plaintiff fails to state  
20 a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When reviewing a  
21 complaint under Rule 12(b)(6), all allegations of material fact “are taken as true and  
22 construed in the light most favorable to the non-moving party.” *Smith v. Jackson*, 84  
23 F.3d 1213, 1217 (9th Cir. 1996). To avoid a Rule 12(b)(6) dismissal, the complaint must  
24 plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp.*  
25 *v. Twombly*, 550 U.S. 554, 570 (2007). Dismissal is appropriate where the complaint  
26 lacks a cognizable legal theory, lacks sufficient facts alleged under a cognizable legal  
27 theory, or contains allegations disclosing some absolute defense or bar to recovery. *See*  
28 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

1     **III. Discussion.**

2           Trust Defendants move to dismiss the Amended Complaint on the following  
3 grounds: (1) Plaintiff does not and cannot allege sufficient facts to show that it has  
4 standing to seek declaratory relief, (2) the Court does not have subject matter jurisdiction,  
5 (3) the Court does not have jurisdiction under the *Rooker-Feldman* doctrine,  
6 (4) Plaintiff's claims are barred by *res judicata*, (5) Plaintiff's claims are barred by quasi-  
7 judicial immunity, and (6) the Court should abstain from exercising subject matter  
8 jurisdiction.

9           **A. Standing.**

10          Trust Defendants make a facial attack on Colorado City's standing to seek  
11 declaratory judgment on both counts because "Colorado City does not and cannot allege  
12 facts showing that it has suffered or is threatened with a concrete and particularized legal  
13 harm that is actual and imminent." Doc. 32, at 6. The Declaratory Judgment Act permits  
14 a federal court to "declare the rights and other legal relations" of parties to "a case of  
15 actual controversy." 28 U.S.C. § 2201. "The 'actual controversy' requirement of the Act  
16 is the same as the 'case or controversy' requirement of Article III of the United States  
17 Constitution." *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co., Inc.*, 655  
18 F.2d 938, 942 (9th Cir. 1981). To have standing, a plaintiff "must have suffered, or be  
19 threatened with, an actual injury traceable to the defendant and likely to be redressed by a  
20 favorable judicial decision." *Lewis v. Continental Bank Corp.*, 494 U.S.472, 477 (1990).

21          The Court agrees with Colorado City that Trust Defendants' reliance on a related  
22 case, *Cooke v. Wisan*, CV09-8152-PCT-JAT, 2010 WL 1641015 (D. Ariz. April 22,  
23 2010), is misplaced. In that case, Judge Teilborg held that the plaintiff, Roland Cooke,  
24 lacked standing to enforce a charitable trust administered by the Utah court, that he could  
25 not assert the legal rights of others, and that his general attacks on Wisan's authority as  
26 manager of the UEP Trust's property were insufficient to establish standing. These are  
27 not the considerations before this Court.

28          First, contrary to Trust Defendants' assertion (Doc. 32, at 6), Colorado City has

1 alleged facts showing that it is threatened with an actual injury. Colorado City alleges  
2 that it will likely have to drill a new well in order to provide the water connection to the  
3 Cookes, which may cost as much as \$150,000. Doc. 16, ¶ 88. Accepting this factual  
4 allegation as true, the Court disagrees with Trust Defendants' argument that Colorado  
5 City would suffer no injury by providing utility services to the Cookes even if Black were  
6 determined to be the rightful occupant. Doc. 32, at 6.

7 Second, a sufficient causal connection exists through Colorado City's allegation  
8 that the imminent injury stems from Trust Defendants' decision to grant occupancy rights  
9 to the Cookes without first taking proper legal steps to extinguish Black's occupancy.  
10 Doc. 37, at 5; Doc. 16, ¶¶ 7-10.

11 Third, the injury is likely to be redressed by the declaratory relief Colorado City  
12 seeks. The city claims that if the Court declares that Trust Defendants acted improperly  
13 when they leased the Property to the Cookes, such a ruling will relieve it from expending  
14 resources to provide a water connection at the request of the Cookes. Doc. 37, at 5.

## 15 **B. Subject Matter Jurisdiction.**

16 Trust Defendants challenge the Court's subject matter jurisdiction under three  
17 doctrines: prior exclusive jurisdiction, the probate exception, and the *Barton/Porter*  
18 doctrine. Doc. 32, at 6.

### 19 **1. Prior Exclusive Jurisdiction.**

20 Relying on the prior exclusive jurisdiction doctrine, Trust Defendants contend that  
21 this Court cannot issue the declaratory relief that Colorado City seeks without disturbing  
22 the Utah state court's jurisdiction over the UEP Trust and its property. Doc. 32, at 8.  
23 The prior exclusive jurisdiction doctrine holds that "when one court is exercising *in rem*  
24 jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same  
25 *res*." *Chapman v. Deutsche Bank Nat. Trust Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011)  
26 (quoting *Marshall v. Marshall*, 547 U.S. 293, 311 (2006)). The doctrine is a mandatory  
27 jurisdictional limitation. *Id.* Where parallel state and federal proceedings seek to  
28 determine interests in specific property as against the whole world (*in rem*), or where the

1 parties' interests in the property serve as the basis of the jurisdiction for the parallel  
2 proceedings (*quasi in rem*), then the doctrine of prior exclusive jurisdiction fully applies.  
3 *Id.* at 1044. Here, no party disputes that the Utah state court first asserted jurisdiction  
4 over the trust litigation in 2005, well before Colorado City filed its action in this Court, or  
5 that the trust litigation was *in rem*. The Utah state court's exercise of jurisdiction takes  
6 priority. *See Chapman*, 651 F.3d at 1044-45.

7 The Court must then determine whether this case is properly characterized as *in*  
8 *rem*, *quasi in rem*, or *in personam*. *See id.* at 1045. In order to characterize the actions,  
9 the Court must "look behind the form of the action[s] to the gravamen of [the] complaint  
10 and the nature of the right[s] sued on." *Id.* (quoting *State Eng'r of Nevada v. South Fork*  
11 *Band of Te-Moak Tribe*, 339 F.3d 804, 810 (9th Cir. 2003)). Colorado City argues that  
12 prior exclusive jurisdiction is inapplicable by attempting to draw a fine distinction: the  
13 Utah court "took control of the [UEP] Trust," but it "has not taken actual possession of  
14 the property at issue in this declaratory relief action." Doc. 37, at 7. The Court finds,  
15 however, that this is not a case it can adjudicate without disturbing the Utah state court's  
16 jurisdiction over the *res*, namely, UEP Trust. *See State Eng'r of Nevada*, 339 F.3d  
17 at 811. In the prior action, the Utah state court appointed Wisan as UEP Trust's special  
18 fiduciary and vested him with power to administer the Trust's assets. This case will  
19 disturb the Utah state court's jurisdiction because Count One seeks a declaration that  
20 Wisan's administration of the Trust, pursuant to the Utah state court's order, was  
21 unconstitutional. In Count Two, the parties' interests in the Property serve as the basis of  
22 the action. *See id.* Therefore, this case may be categorized as *quasi in rem*, and the Court  
23 finds that the doctrine of prior exclusive jurisdiction applies. *Id.*

24 There is, however, an exception to the prior exclusive jurisdiction doctrine.  
25 Colorado City argues that prior exclusive jurisdiction does not apply to claims for  
26 declaratory relief regarding property interests. Doc. 37, at 8. The Supreme Court has  
27 held that prior exclusive jurisdiction "has no application to a case in federal court based  
28 upon diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his



1 right of his interest as a basis of a claim against a fund in the possession of a state  
2 court[.]” *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466-67 (1939);  
3 *see also SJ Properties Suites v. Specialty Finance Group, LLC*, 733 F. Supp. 2d 1021,  
4 1034 (E.D. Wis. 2010) (“To the extent that the Plaintiffs seek an adjudication of their  
5 rights in the Property, a claim which is quasi *in rem*, the doctrine of prior exclusive  
6 jurisdiction does not preclude this Court from exercising its jurisdiction and its  
7 concomitant power to adjudicate the quantum of the parties’ interests in the Property[.]”).

8 Both counts in Colorado City’s Amended Complaint seek an adjudication of  
9 interests in the Property. Count One does so indirectly by asking the Court to rule on the  
10 constitutionality of Wisan’s management of UEP Trust’s assets. If the Court finds that  
11 Wisan’s conduct was unconstitutional, then Colorado City argues that he lacked authority  
12 to approve Ronald Cooke’s petition for benefits, and Cooke was ineligible to receive an  
13 assignment of Trust assets. Doc. 16, ¶¶ 107-112. Count Two directly seeks an  
14 adjudication of interest in the Property by asking the Court to determine whether the  
15 Cookes or Black have a lawful right to occupy the Property. Doc. 16, ¶¶ 114-115.  
16 Although the prior exclusive jurisdiction doctrine applies to this case, the claims asserted  
17 appear to fall under the declaratory relief exception. The Court therefore concludes that  
18 prior exclusive jurisdiction does not preclude it from granting Colorado City’s requested  
19 relief.

## 20 2. Probate Exception.

21 Trust Defendants argue that the instant action is improper under the probate  
22 exception because the Amended Complaint alleges that Wisan’s conduct was  
23 unconstitutional and that the UEP Trust’s benefits were unlawfully assigned to Ronald  
24 Cooke. Doc. 32, at 9. Colorado City counters that the probate exception does not apply  
25 because this action does not invoke *in rem* jurisdiction and will only impact the parties to  
26 this case. Doc. 37, at 9.

27 “[T]he probate exception reserves to state probate courts the probate or annulment  
28 of a will and the administration of a decedent’s estate; it also precludes federal courts



1 from disposing of property that is in the custody of a state probate court. But it does not  
2 bar federal courts from adjudicating matters outside those confines and otherwise within  
3 federal jurisdiction.” *Marshall v. Marshall*, 547 U.S. 293, 296 (2006). The Supreme  
4 Court has “admonished lower courts for applying the probate exception too broadly.”  
5 *Campi v. Chirco Trust UDT 02-11-97*, 223 Fed. Appx. 584, 585 (9th Cir. 2007). In  
6 *Campi*, the Ninth Circuit reasoned that the case “does *not* concern the probate or  
7 annulment of a testamentary instrument. Instead, it involves a cause of action alleging  
8 fraud, undue influence, and breach of fiduciary duties. Claims merely related to probate  
9 matters are not within the probate exception.” *Campi*, 223 Fed. Appx. at 585.

10 Construing the probate exception narrowly and following the Ninth Circuit’s  
11 reasoning, the Court agrees with Colorado City that the probate exception does not apply.  
12 Doc. 37, at 9. As in *Campi*, this case does not concern the probate or annulment of a  
13 decedent’s estate, nor is this Court asked to dispose of property in the custody of a state  
14 probate court. Rather, Count One involves the constitutionality of Wisan’s actions as  
15 special fiduciary pursuant to the reformation of the UEP Trust. Doc. 16, at 15. This  
16 claim is certainly related to the probate matters adjudicated by Judge Lindberg in Utah  
17 state court, but appears to be a separate issue from the state court’s power to administer  
18 the estate. *See, e.g., Campi*, 223 Fed. Appx. at 585; *Giardina v. Fontana*, 733 F.2d 1047,  
19 1050 (2d Cir. 1984) (holding that a complaint seeking a “declaratory judgment that the  
20 assignment [of an interest in an estate] was null and void and/or a rescission of the  
21 assignment . . . could be granted without in any way interfering with the probate  
22 proceedings,” and that “this branch of relief does not fall within the probate exception to  
23 diversity jurisdiction.”).

24 The Supreme Court has also instructed that a federal court “may exercise its  
25 jurisdiction to adjudicate rights in such property where the final judgment does not  
26 undertake to interfere with the state court’s possession save to the extent that the state  
27 court is bound by the judgment to recognize the right adjudicated by the federal court.”  
28 *Markham v. Allen*, 326 U.S. 490, 494 (1946). In Count Two of the Amended Complaint,

1 Colorado City asks the Court to declare whether the Cookes or Black have lawful rights  
2 to UEP Trust property. Doc. 16, at 16. The Supreme Court has clarified that federal  
3 courts have jurisdiction to make such an adjudication of property rights. The Court  
4 therefore concludes that the probate exception does not bar subject matter jurisdiction on  
5 either claim.

6 **3. Barton Rule and 28 U.S.C. § 959(a).**

7 Trust Defendants argue that the Court does not have subject matter jurisdiction  
8 under the *Barton* rule because the Utah state court has not given permission to Colorado  
9 City to file a federal lawsuit against Wisan as special fiduciary. Doc. 32, at 11. The  
10 Court will consider this argument only with respect to Count One, because Count Two of  
11 the Amended Complaint does not allege a claim against Wisan. Colorado City does not  
12 dispute the application of the *Barton* rule, but argues that Wisan's conduct falls within  
13 the ultra vires and business exceptions to the rule. Doc. 37, at 9-11.

14 The Supreme Court held in *Barton v. Barbour*, 104 U.S. 126 (1881), that when a  
15 plaintiff sues a receiver outside of and without the permission of the appointing court, the  
16 non-appointing court is without jurisdiction to entertain the suit. *Med. Dev. Int'l v.*  
17 *California Dept. of Corr. & Rehab.*, 585 F.3d 1211, 1216-17 (9th Cir. 2009) (citing  
18 *Barton*, 104 U.S. at 131). "When a court exercising jurisdiction in equity appoints a  
19 receiver of all the property of a corporation, the court assumes the administration of the  
20 estate. The possession of the receiver is the possession of the court[.]" *Id.* (quoting  
21 *Porter v. Sabin*, 149 U.S. 473, 479 (1893)). It is therefore for that court "to decide  
22 whether it will determine for itself all claims of or against the receiver, or will allow them  
23 to be litigated elsewhere." *Porter*, 149 U.S. at 479.

24 Congress has enacted a business exception to the *Barton* rule: "Trustees, receivers  
25 or managers of any property, including debtors in possession, may be sued, without leave  
26 of the court appointing them, with respect to any of their acts or transactions in carrying  
27 on business connected with such property." 28 U.S.C. § 959(a). The initial  
28 determination for the Court is whether Wisan was "carrying on business" within the

1 meaning of § 959(a). The Ninth Circuit has held that § 959(a) “applies only if the . . .  
 2 officer is actually operating the business, and only to ‘acts or transactions in conducting  
 3 the debtor’s enterprise in the ordinary sense of the words or in pursuing that business as  
 4 an ongoing enterprise.’” *Med. Dev. Int’l*, 585 F.3d at 1217-18 (quoting *In re Crown*  
 5 *Vantage*, 421 F.3d 963, 971-72 (9th Cir. 2005)). As Trust Defendants point out, at least  
 6 one other Circuit Court of Appeals has determined that “actions taken in the mere  
 7 continuous administration of property under order of the court do not constitute an ‘act’  
 8 or ‘transaction’ in carrying on business connected with the estate.” *See* Doc. 40, at 6  
 9 (quoting *Muratore v. Darr*, 375 F.3d 140, 144 (1st Cir. 2004)).

10 Wisan was administering UEP Trust’s property under order of the Utah state court  
 11 “expanding the Special Fiduciary’s powers.” Doc. 16, ¶ 28. Wisan’s discretion in  
 12 conducting the UEP Trust is analogous to the facts in *Medical Development*  
 13 *International*. In that case, the Ninth Circuit held that § 959(a) applied because the lower  
 14 court had assigned the receiver all powers relating to administration, control,  
 15 management, operation, and financing. *Med. Dev. Int’l*, 585 F.3d at 1217. Wisan was  
 16 not appointed special fiduciary merely to wind up or reorganize UEP Trust’s operations;  
 17 UEP Trust is an ongoing entity. *See Med. Dev. Int’l*, 585 F.3d at 1217. Wisan was  
 18 vested with the authority to file lawsuits on behalf of UEP Trust, manage, lease, or rent  
 19 Trust property at his discretion, and identify and provide homes to Trust beneficiaries.  
 20 Doc. 16, at ¶¶ 28, 37. Colorado City challenges Wisan’s conduct in operating the Trust’s  
 21 business in an ongoing or usual manner. *Med. Dev. Int’l*, 585 F.3d at 1217-18. Given the  
 22 nature of Wisan’s involvement with UEP Trust, the Court concludes that Wisan was  
 23 conducting business within the meaning of § 959(a). Colorado City therefore did not  
 24 need permission from the Utah state court to bring a claim against Wisan.

### 25 **C. Rooker-Feldman Doctrine.**

26 Trust Defendants argue that, under the *Rooker-Feldman* doctrine, the Court does  
 27 not have jurisdiction to consider the constitutionality of Wisan’s conduct because it was  
 28 expressly authorized by the Utah state court. Doc. 32, at 12. This argument challenges

1 jurisdiction on only Count One of the Amended Complaint. “The *Rooker-Feldman*  
2 doctrine prevents . . . federal courts from exercising jurisdiction over cases brought by  
3 “state-court losers” challenging “state-court judgments rendered before the district  
4 proceedings commenced.” *Lance v. Dennis*, 546 U.S. 459, 460 (2006) (quoting *Exxon*  
5 *Mobil Corp. v. Saudi Basic Industries Corp.*, 554 U.S. 280, 284 (2005)). The Supreme  
6 Court has held *Rooker-Feldman* inapplicable where the party against whom the doctrine  
7 is invoked was not a party to the underlying state-court proceeding. *Lance*, 546 U.S.  
8 at 464. It has cautioned that the doctrine “is not simply preclusion by another name,” and  
9 that it applies only in limited circumstances. *Id.* at 466. “The *Rooker-Feldman* doctrine  
10 does not bar actions by nonparties to the earlier state-court judgment simply because, for  
11 purposes of preclusion law, they could be considered in privity with a party to the  
12 judgment.” *Id.*

13 Colorado City was not a party in the Utah state court proceeding. The Utah  
14 Attorney General brought the action in state court for breach of trust against the UEP  
15 Trustees. Doc. 16, ¶¶ 24-25. Trust Defendants argue that it is irrelevant that Colorado  
16 City did not participate in the state court proceedings because where the state court action  
17 is an estate proceeding, *Rooker-Feldman* is not limited to participants. Doc. 32, at 12. In  
18 so arguing, Trust Defendants cite a footnote in *Lance v. Davis*, in which the Supreme  
19 Court notes that it does not address “whether there are *any* circumstances, however  
20 limited, in which *Rooker-Feldman* may be applied against a party not named in an earlier  
21 state proceeding[.]” *Lance*, 546 U.S. at 466, n.2 (emphasis in original). While the  
22 Supreme Court has left open the possibility that the doctrine may apply in some cases to  
23 nonparties, the Court will apply the *Lance* holding to this case. Because Colorado City  
24 was not a party in the Utah state proceeding and because the constitutionality claim was  
25 not itself separately litigated and rejected by the Utah state court, the Court concludes  
26 that the claim does not constitute a *de facto* appeal of a state court decision and that  
27 *Rooker-Feldman* does not bar subject matter jurisdiction over Count One. *See Reusser v.*  
28 *Wachovia Bank*, 525 F.3d 855, 860 (9th Cir. 2008) (holding that the “claims constitute a

1 *de facto* appeal of a state court decision and are therefore barred by the *Rooker-Feldman*  
2 doctrine because the claim was itself separately litigated before and rejected by an  
3 Oregon state court).

4 **D. *Res Judicata.***

5 Trust Defendants argue that Colorado City's Amended Complaint is barred by *res*  
6 *judicata*. Doc. 32, at 12. The elements necessary to establish *res judicata* are: "(1) an  
7 identity of claims, (2) a final judgment on the merits, and (3) privity between parties."  
8 *Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1052 (9th Cir. 2005). Colorado  
9 City responds that there is no identity of claims and no privity between the parties.  
10 Doc. 37, at 13-14.

11 This Circuit approaches the question of identical claims by applying several  
12 criteria, including "(1) whether rights or interests established in the prior judgment would  
13 be destroyed or impaired by prosecution of the second action; (2) whether substantially  
14 the same evidence is presented in the two actions; (3) whether the two suits involve  
15 infringement of the same right; and (4) whether the two suits arise out of the same  
16 transactional nucleus of facts." *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-  
17 02 (9th Cir. 1982). The Court has considered these factors and concludes that there is no  
18 identity of claims between the Utah state court action and the instant action. In the Utah  
19 state court action, the claims arose out of the Utah Attorney General's request to suspend  
20 the power and authority of the UEP Trustees due to an alleged breach of trust. Doc. 16,  
21 ¶¶ 24-25. In the instant action, Colorado City asks for declaratory relief as to the  
22 constitutionality of Wisan's conduct in managing UEP Trust assets and the rightful  
23 ownership of the Property at issue. *Id.*, ¶¶ 104-116. The two actions do not involve  
24 infringement of the same right, nor do the actions arise out of the same nucleus of facts  
25 given that Wisan was appointed special fiduciary of the UEP Trust as a result of the Utah  
26 state court action and thus his conduct challenged in this case could not have occurred at  
27 the time of the Utah state court action. Because there is no identity of claims, Colorado  
28 City's Amended Complaint is not barred by *res judicata*.

1           **E.      Quasi-Judicial Immunity.**

2           Trust Defendants moved to dismiss the Amended Complaint on the basis of  
3 Wisan's alleged quasi-judicial immunity, but have since withdrawn this argument.  
4 Doc. 40, at 8.

5           **F.      Declaratory Judgment Act.**

6           The Court has discretion under the Declaratory Judgment Act, 28 U.S.C. § 2201,  
7 to grant or decline jurisdiction over declaratory actions: "In a case of actual controversy  
8 within its jurisdiction . . . any court of the United States, upon filing of an appropriate  
9 pleading, may declare the rights and other legal relations of any interested party seeking  
10 such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.  
11 The statute is "deliberately cast in terms of permissive, rather than mandatory, authority."  
12 *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (quoting *Pub. Serv.*  
13 *Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 250 (1952) (J. Reed, concurring)). The  
14 Court's discretion is not unfettered; it must look to the *Brillhart* factors for guidance in  
15 exercising its discretion. *See Dizol*, 133 F.3d at 1223. "The district court should avoid  
16 needless determination of state law issues; it should discourage litigants from filing  
17 declaratory actions as a means of forum shopping; and it should avoid duplicative  
18 litigation." *Id.* at 1225.

19           After considering the *Brillhart* factors, the Court will not dismiss the action based  
20 on Trust Defendants' motion (Doc. 32). The Court agrees with Colorado City that  
21 hearing this action will "serve a useful purpose to clarify and settle the legal relations at  
22 issue." Doc. 37, at 15. In the related action before Judge Teilborg, CV10-08105-JAT,  
23 the Cookes allege that Colorado City discriminated against them by denying them a  
24 culinary water connection on the basis of religion and disability. Doc. 16, ¶ 60. The  
25 Court believes that the discrimination claims before Judge Teilborg are distinct from the  
26 issues in this action. Resolving the discrimination claims will not clarify whether Wisan  
27 acted unconstitutionally and whether the Cookes or Black have the right to occupy the  
28 Property. The action before Judge Teilborg will not clarify all of the legal relations at

1 issue in the instant action because only Colorado City and the Cookes are named in both  
2 actions. UEP Trust, Bruce Wisan, and the Blacks are parties in this action but are not  
3 named in the action before Judge Teilborg. While any relief that the Court grants in this  
4 case will not be binding in the case before Judge Teilborg, and vice versa, it is irrelevant  
5 under the Declaratory Relief Act whether the parties can or do seek further relief based  
6 on the Court's declaration of rights in this action. At this stage in the proceedings, the  
7 Court will not refuse to exercise its discretion to grant declaratory relief.

8 **IT IS ORDERED:**

9 1. Defendants UEP Trust and Bruce Wisan's motion to dismiss (Doc. 32),  
10 joined by Defendants Ronald and Jinjer Cooke, is **denied**.

11 2. The Court will rule on the motion to dismiss filed by the Cookes (Doc. 41)  
12 when it is fully briefed.

13 3. The Court will set a Case Management Conference by separate order.

14 Dated this 4th day of January, 2012.

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19 David G. Campbell  
20 United States District Judge  
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